No. 10325

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

H. HARRY MEYERS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S SUPPLEMENTAL BRIEF.

JOHN W. PRESTON,
458 So. Spring St., Los Angeles 13, Calif.,

BERTIL E. JOHNSON,
505 Rust Building, Tacoma 2, Washington,

Attorneys for Appellant

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Statement.

Further consideration of appellant's first and fourth assignments of error is desirable. Heretofore the discussion of Assignment No. 1 has been limited largely to the ground that Government's Exhibit 98 was hearsay and hence inadmissible. Heretofore discussion of Assignment No. 4 by appellant has been limited to a general statement only, which should be amplified both as to the facts and the law applicable thereto.

I.

Assignment of Error No. 1.

Appellant's first assignment of error is:

> "That the District Court erred in admitting in evidence, over the objection of defendant-appellant, Government's Exhibit 98, on the ground that the same was incompetent and hearsay." [Tr. pp. 99-105; App. Op. Br. pp. 56-61.]

Government's Exhibit 98 (letter from Joseph B. Strauss to Post Office Inspector J. S. Swenson) was not only hearsay and, therefore, inadmissible, but it was incompetent for other reasons which will be hereinafter stated:

The Government's brief (pp. 44-49) attempts to justify the admission of Government's Exhibit 98 on the theory that it was evidence similar to that which had been introduced by appellant and that .it was necesasry to remove any unfair prejudice which might otherwise have ensued from appellant's evidence previously introduced consisting of letters written by Joseph B. Strauss to H. Harry Meyers during a period of time beginning in December, 1928, and ending in June, 1934. These letters are identified in the record as Defendant's Exhibits A-51 to A-107 [Index pp. ii-vi; Tr. pp. 573-857] and establish clearly a close and intimate personal and business connection and relationship between Strauss and Meyers during the period mentioned. The admission of these letters from Strauss to Meyers was proper, since they tend to rebut the contention and evidence of the Government that appellant was not connected or associated with the Joseph B. Strauss interests or with the promotion and construction of the Golden Gate Bridge. It should be noted that this connection and association had

been challenged and denied in the Indictment [Tr. pp. 7-8] and was made a major issue in the case by the Government.

Specifically, the Government contends (its brief, p. 43) that Defendant's Exhibits A-68, A-69, A-71 and A-77 were communications by Joseph B. Strauss to third parties, and that therefore the admission thereof in evidence warranted the admission of Government's Exhibit 98 which was unquestionably a communication by Strauss to a third party, namely, Post Office Inspector J. S. Swenson. This contention, however, is not supported by the facts shown by the record.

A.

Defendant's Exhibits A-68, A-69, A-71 and A-77 Are Not Communications to Third Parties.

Defendant's Exhibit A-68 [Tr. p. 699] is a letter from Joseph B. Strauss to H. Harry Meyers. Enclosed therein was a copy of a letter from Strauss to his son Ralph upon which Strauss asked Meyers' opinion.

Defendant's Exhibit A-69 [Tr. p. 706] is a letter from Joseph B. Strauss to H. Harry Meyers. Enclosed therein was copy of a letter from Strauss to Charles Weinfeld, Chicago, Illinois, relating to business matters and relations between them upon which Strauss asked Meyers for his opinion.

Defendant's Exhibit A-71 [Tr. p. 721] is, in form only, copy of a letter from Joseph B. Strauss to August Fritze. Actually, it is an agreement of settlement between those parties of certain matters in dispute between them in strict accordance with an award made by H. Harry Meyers. The communication bears the signature of

Strauss and an acceptance thereof by Fritze stating that "The above is satisfactory and acceptable. (Signed) August Fritze." [Tr. p. 722.] Reference to the letter is conclusive that it was a contract of settlement in conformity with the award made by Meyers as arbitrator.

Defendant's Exhibit A-77 [Tr. p. 731] is a letter from Joseph B. Strauss to Harry Meyers. Enclosed therein was a copy of a letter from Strauss to William P. Fillmer, President of the Golden Gate Bridge & Highway District, which Strauss wrote "I thought it wise to write such a letter and am sending the copy to you for your information." [Tr. p. 731.]

It thus appears that each and all of the above-mentioned and described letters which the Government says were communications to third parties were, in fact, communications to Meyers and concerned Meyers in his relations with Strauss. The admission of these letters did not justify the admission of Government's Exhibit 98 upon the ground urged by the Government, or upon any other ground.

B.

Government's Exhibit 98 Is Not Similar to the Letters From Strauss to Meyers.

There are striking dissimilarities between the letters from Strauss to Meyers and the letter from Strauss to Swenson. (G. Ex. 98.) Some of these are: (1) the letters from Strauss to Meyers were communications *inter sese* and not with third parties; (2) said letters were declarations by, and against the interest of, Strauss; (3) said letters related to purely contemporary matters; and (4) said letters were not written with a view of litigation.

Government's Exhibit 98 (Strauss' letter to Swenson), admittedly is a communication with a third party: it was not against the interest of Strauss; it was not contemporary, but was written several years after the alleged events mentioned therein; and, obviously, it was written in view of the investigation and prospective criminal prosecution of Meyers. It is thus apparent that there was actually no similarity between the letters from Strauss to Meyers and Government's Exhibit 98.

Moreover, Government's Exhibit 98 is dissimilar from the letters of Strauss to Meyers in other important respects, and is subject to objection and criticism accordingly. Some of these are: (1) Many of the statements in the letter from Strauss to Swenson (Government's Exhibit 98) were based upon (undisclosed) information, from which Strauss expressed his opinions, which would not have been admissible even if he had been present and testifying in person: (2) said letter, in essence, constituted an attack upon the character of Meyers which had not been placed in issue; (3) said letter was manifestly scandalous and malicious; and (4) it was not responsive to any matters in the letters of Strauss to Meyers which had been admitted in evidence.

In view of the substantial dissimilarities between the letters of Strauss to Meyers and the letter of Strauss to Swenson (G. Ex. 98), *supra*, it is apparent that the Government's argument (Its Brief, pp. 43-49) and the authorities there cited, do not sustain its contention concerning appellant's first assignment of error.

C.

Government's Exhibit 98 Was Not Admissible Under Any of the Exceptions to the Rule Excluding Hearsay Evidence.

That Government's Exhibit 98 was pure hearsay cannot be denied. It is well settled that, in general, hearsay evidence is inadmissible. (See 20 Am. Jur. 403, Sections 400, 403; 31 C. J. S. 919, Section 193, and the many federal cases there cited, in footnote 2. See, also, cases cited in Appellant's Opening Brief pages 34-44.)

There are, however, certain exceptions to the rule that hearsay evidence is inadmissible.

> 20 Am. Jur. 402;
>
> Appellant's Op. Br. p. 34.

These exceptions are stated in 20 Am. Jur. 402, Section 453, as follows:

> "While the hearsay rule has been asserted and applied so often that it is not questioned, it seems safe to assert that the courts have generally been willing to relax the rule in the interest of justice. It is recognized that hearsay may be relevant and material. In some cases it may be the only relevant and material evidence, as where a sole witness to a transaction is dead or beyond the reach of a subpoena. While the mere fact that a witness is dead does not render his declarations admissible, if in addition to the death of a witness there are circumstances which attribute verity to his declarations, the hearsay rule may be relaxed to permit the admission of such declaration. *For example, if a witness is deceased, his declarations against his own interest may be admitted in evidence as relevant and material*

to the issues in the case on the theory that he would not tell an untruth against his own interest. Again, the dying declarations of the victim of a homicide are deemed admissible notwithstanding they are hearsay, on the theory that there is little likelihood of a conscious falsification of statements made under such circumstances. Most of the exceptions to the hearsay rule are based upon the necessities of the case. If there is a possibility of obtaining testimony other than hearsay, the law does not generally permit the introduction of hearsay. Thus, one of the conditions under which entries in family records are admitted in evidence, notwithstanding the lack of an opportunity to cross-examine the person who made them, is the death, or at least the absence, of such person." (Italics ours.)

Clearly, the letter from Strauss to Swenson (G. Ex. 98) does not come within any of the exceptions stated, unless it be the declarations against interest of a witness deceased.

D.

Government's Exhibit 98 Was Not Admissible Under the Rule That the Declarations Against Interest of a Deceased Person May Sometimes Be Received in Evidence.

The rule here invoked is stated in 31 C. J. S. 960, 961, Section 218b, as follows:

"Where a declarant is unavailable as a witness because of his death, it is well settled that evidence may, in a proper case, be received of his declarations against his interest, whether or not such declarations are part of the *res gestae.* The absence of privity between declarant and the parties to the suit does not preclude the admission of his declarations, provided they were adverse to his interests.

"On the other hand, the declarations of a person since deceased which are not against his interest are inadmissible; and, where the death of declarant is in issue, it has been held that evidence of his declarations against interest is inadmissible."

And it is further stated, *idem* p. 962, Section 219:

"To be admissible as a declaration against interest, the declarant must have had an interest in the subject matter of his declaration.

"A declaration is not admissible in evidence unless the interest against which it militated was of either a pecuniary or proprietary nature. Accordingly an unsworn statement of a third person is not admissible merely because it appears to have been against the interest of the declarant by subjecting him to a civil action or to a criminal prosecution. However, the declaration may be admissible where it is against the pecuniary or the proprietary interest of the declarant. . . . Where the declarant had adequate knowledge of the facts stated, and primary evidence cannot be procured, the declaration is admissible if made against his pecuniary interest."

As supporting the rule, *supra,* see:

Halleck v. Hartford Acc. & Ind. Co., 75 F. (2d) 800;

Citizens etc. Bank v. Santa Rita Hotel Co., 22 F. (2d) 524;

Bonner v. Texas Company, 89 F. (2d) 291.

In *Halleck v. Hartford etc. Co.,* 75 F. (2d) 801, *supra,* the Court said, at page 802:

"Declarations or entries of a person since deceased made against his interest and not with a view to

> litigation are evidence, *this exception resting on the probable truth of a statement which is against financial interest when made.*" (Italics ours.)

In *Bonner v. Texas Company*, 89 F. (2d) 291, the plaintiff offered in evidence the statement of the deceased to his wife and another person as to how the accident occurred which resulted in his injury and death. The statement was made about 45 minutes after the explosion and at a place several miles distant therefrom. Upon the admissibility of the statement in evidence, the Court said, page 293:

> "To justify admission of Bonner's statement, the doctrine of dying declarations is faintly urged, but that exception to the rule against hearsay is made only in favor of criminal justice and has not been much applied in civil cases. Nor does it appear that the declarant was in fact in *articulo mortis*. That this important witness has died does not render his declarations admissible, *since they were not against his interest.* The general rule that (such) statements . . . are not to be received in evidence, we recently examined along with the established exception touching *res gestae* in Halleck v. Hartford etc. Co., (C. C. A.), 75 F. 2d 800 . . ." (Italics ours.)

In *Citizens Nat'l Bank v. Santa Rita Hotel Co.* (9 Cir.), 22 F. (2d) 524, the statement of the deceased Secretary of the Hotel Company that he issued two stock certificates to himself and forged the name of the President of the Company thereto without right and authority, was admitted in evidence. The Bank assigned this as error. The Court said, page 525:

> "It is conceded by counsel for the appellant (Bank) that declarations, oral or written, made by a deceased

person as to facts presumably within his knowledge, if relevant to the matter of inquiry are admissible in evidence as between third parties, when it appears that the declarant is dead; that the declaration was against his pecuniary interest: that the declaration was of a fact in relation to a matter of which he was personally cognizant, and that the declarant had no probable motive to falsify the fact declared. (Citing Minn. Case.) But they earnestly insist that the declaration in question was not against the pecuniary interest of the declarant. With this contention we are unable to agree . . . it will scarcely be contended that a solemn admission by a party that a certificate of stock . . . under which he claims is a forgery is not against his pecuniary interest."

From the foregoing, it is manifest that the declarations of a deceased person are inadmissible unless they were made against his interest. Since the declarations and statements of Strauss in his letter to Swenson were not against his interest, the letter was therefore not admissible.

E.

Government's Exhibit 98 Was Not Admissible on the Ground That It Was Necessary for Removing an Unfair Prejudice Which Might Otherwise Have Ensued From the Admission of the Letters of Strauss to Meyers.

It must be remembered that any and all connection or relationship between Strauss and Meyers in promoting and building the Golden Gate Bridge was challenged and denied by the Government in the Indictment and at all times throughout the trial of the case. The Government's case against Meyers was based very largely upon the theory that the purchasers of interests in oil and gas

leases were deceived and defrauded by representations that Meyers was connected with the Joseph B. Strauss interests in developing and building the Golden Gate Bridge, which representations the Indictment charged were false. Evidence was offered by the Government, and admitted by the Court, to establish this theory. It was therefore competent for the defendant to show, by the letters of Joseph B. Strauss to the defendant, that there had been such a connection and relationship. Strauss, being deceased at the time of the trial, could not testify. His letters to defendant, if against interest, were therefore competent evidence of such connection and relationship.

The vital importance of these letters to defendant and their competency is shown by the following statement of the trial court [Tr. p. 1452]:

> "And the matter of that relationship and the belief that the public all placed in it and relied upon the representation in that regard, was a major,—in this Court's opinion, was a major factor in inducing the public to buy these leases that involved almost two million dollars.
>
> "Now, when the defense offered these various documents in evidence some of them were of an extremely intimate character. One, I recall, and I can not give the number of it, was written in longhand by Strauss and he asked that it be destroyed. And the defendant produced it and offered it here in evidence. They had some secret code between them. Strauss being deceased, of course could not be called to refute the contents and effect of these letters; and to have allowed the record to stand in that position with the defendant having made it, would have created a situation, as far as the triers of the facts were concerned,

> that would have compelled them to resolve the allegation in the indictment that there was an intimate and close relationship between Strauss and the defendant, and that the defendant was one of the major characters in the construction of the Golden Gate bridge."

In view of the Government's contention that the admission of its Exhibit 98 was necessary to remove an unfair prejudice created by the admission of letters from Strauss to Meyers, brief reference to some of those letters seems necessary and proper.

Defendant's Exhibit A-51 [Tr. p. 573] is a letter from Strauss to Meyers authorizing the latter to take over the agency of August Fritze to represent Strauss "in the matter of the Golden Gate Bridge" on a basis of settlement satisfactory to Fritze. Defendant's Exhibit A-52 [Tr. p. 574] is a letter from Strauss to Meyers authorizing Meyers to take over the agency of Charles H. Brennan to "act for my company and myself in securing for me the appointment as engineer of the Golden Gate Bridge District."

Defendant's Exhibit A-56 [Tr. p. 580] is a letter from Strauss to Meyers agreeing that he will pay Meyers One Hundred and Twenty Thousand Dollars ($120,000) as and when he receives payments from the District "in consideration of your services in acting for me in connection with the Golden Gate Bridge."

Defendant's Exhibit A-57 [Tr. p. 581] is a letter from Strauss to Meyers written a few weeks after Exhibit A-56 and in supplement thereof agreeing "to pay you as commission and in consideration of your services in securing

for me the appointment as Engineer . . . One Hundred Thousand Dollars" as and when Strauss received payments from the District.

Defendant's Exhibit A-58 [Tr. p. 582] is a letter from Strauss to Meyers, dated April 27, 1933, some four years after Exhibits A-56 and A-57, referring to the agreements shown by said exhibits, reciting that $104,250 has been paid thereon by Strauss to Meyers, and that there is a balance due from Strauss to Meyers of $110,000.

Defendant's Exhibit A-79 [Tr. p. 742] is a letter from Strauss to Meyers showing enclosures therein of copies of letters to Strauss from John W. Weeks, Major Schulz, Secretary of War Hurley, President Fillmer of the Bridge District, Ass't Secretary of War Davidson, Major Ropes and George H. Harlan, all relating to phases of promotion or construction of the Golden Gate Bridge.

Other letters from Strauss to Meyers show: Defendant's Exhibit A-81 [Tr. p. 748] that Meyers was in New York City representing Strauss in reference to the sale of the bond issue for the construction of the Bridge; A-83 [Tr. p. 752] that Meyers was in New York on matters for Strauss and the Bridge; Defendant's Exhibits A-84 [Tr. p. 756], A-86 [Tr. p. 770], A-87 [Tr. p. 776], A-88 [Tr. p. 780] from Strauss to Meyers in New York City relating to financing and other phases of the promotion and construction of the Bridge.

Space forbids a detailed analysis of other letters from Strauss to Meyers, admitted in evidence, but they are of like nature to those above mentioned and set forth.

The Government is not in position to complain that it was unfairly prejudiced by the admission of these letters from Strauss to Meyers, in view of its contention throughout the case that Meyers was not connected or associated with the Joseph B. Strauss interests in the promotion and construction of the Golden Gate Bridge. The Government having made an issue out of such connection or association, both in the Indictment and the evidence, the defendant was entitled to show by any competent evidence available to him that the connection or association actually had existed. The declarations of Mr. Strauss in his letters to Meyers were competent on the issue raised by the Government under the rule that declarations against interest by a person since deceased may be admitted in evidence.

But, the admission of this *competent* evidence on behalf of defendant Meyers did not justify the admission of *incompetent and hearsay evidence,* consisting of Government's Exhibit 98, no matter how damaging the former might be to the Government's case. Such damage cannot be classified as "unfair prejudice", as claimed in the Government's Brief (pp. 46-49).

Moreover, the letters from Strauss to Meyers constituted the best evidence of the connection and relationship, business and otherwise, between those parties because they were contemporaneous of the matters discussed therein. In this respect these letters were a part of the *res gestae;* they were current and spontaneous statements and expressions by Strauss of the facts and circumstances

surrounding and growing out of the relationship of the parties, and wholly exclude any idea of deliberation or falsification. These letters meet every requirement of the *res gestae* rule as stated in 22 C. J. S. 1044, Section 662, as follows:

> ". . . the ultimate test is spontaneity and logical relation to the main event, and where an act or declaration springs out of the transaction while the parties are still laboring under the excitement and strain of the circumstances and at a time so near it as to preclude the idea of deliberation or fabrication, it is to be regarded as spontaneous within the meaning of the rule."

But, the letter from Strauss to Swenson (Government's Exhibit 98) does not come within the above statement of the *res gestae* rule. On the contrary, that letter should have been excluded under the inhibition thus stated in 22 C. J. S. 1047, Section 662:

> "Conversely, matters so separated or disconnected in point of time or circumstance from the act charged as not to be a part of a continuous transaction are no part of the *res gestae* of the act."

Moreover, the letter from Strauss to Swenson (G. Ex. 98) comes within the condemnation of the rule that

> ". . . a declaration as to a mere belief of the declarant is not admissible when such belief is not a fact in issue." (22 C. J. S. 1049.)

II.

Assignment of Error No. IV.

Appellant's fourth assignment of error is:

> "The District Court erred in permitting the witness E*a*rnest A. Troeger, to testify on behalf of the Government as follows: Over the objection of defendant appellant. That said testimony related to incidents which happened approximately 14 years before the alleged violation of the postal laws, as set forth in the Indictment; that said testimony was incompetent, immaterial and too remote and the only purpose for said testimony, apparently was to show a similar scheme and device." [Tr. pp. 107-108.]

The witness, Ernest A. Troeger, was called by the Government and, over repeated objections by appellant, testified concerning alleged business relations between his deceased father and appellant, H. Harry Meyers, during a period commencing January 22, 1920, and ending January 23, 1923, which period was approximately 14 years before the transactions complained of in the Indictment in this case.

The following colloquy between the trial court and counsel shows the *ostensible* purpose of the Government in introducing the evidence of the witness Troeger and the reason assigned by the court for its admission:

> "Mr. Hile: I can state the purpose, if Your Honor please.
>
> The Court: Similar conduct and acts, for the purpose of establishing intent in this case?
>
> Mr. Hile: Yes, that is one of the aspects of the whole situation.

> Mr. Simon: I object to it as being too remote, if that is the purpose." [Tr. p. 911.]

Later on, following other argument and colloquy between court and counsel, the court said:

> "This line of evidence will be admitted with limitations. The jury is instructed, of course, that it is admitted not to prove any issue in this case other than the bearing it might have, if any, upon the element of intent, which is an important element in this case." [Tr. pp. 912, 913.]

The Troeger testimony was also objected to upon the grounds that the same was incompetent and immaterial.

It is apparent from the record, however, that the *principal* reason for the introduction of the testimony of the witness Troeger was to get before the jury the supposed fact that appellant Meyers was unable to pay a certain note for $7,500.00 to the father of the witness Troeger as and when the same became due. Letters from appellant Meyers to John F. R. Troeger were offered and admitted in evidence over objections of appellant and the same are identified in the transcript as Plaintiff's Exhibits 103, 104, 105 and 106 which letters stated in substance that Meyers would have to have additional time within which to pay said note, without disclosing the reasons therefor. It is also apparent from the record that the evidence of the witness Troeger was introduced for the purpose of showing acts and transactions constituting fraud and deceit similar to those alleged in the Indictment in this case and also to show a similar scheme and device to perpetrate the alleged fraud.

The evidence of the witness, Ernest A. Troeger, was not only too remote and unrelated to the issues on trial to show intent by similar acts or conduct, but it was wholly insufficient to establish any element of fraud, deception or bad faith by appellant Meyers in his relations with the father of the witness Troeger.

A.

Troeger Transactions Too Remote to Show Intent.

The transactions testified to by the witness, Ernest A. Troeger, occurred approximately 14 years before the alleged criminal acts charged in the Indictment in this case. This is too remote.

The rule here applicable is stated in 20 Am. Jur., page 282, Section 303, as follows:

> "Where fraud is an issue, evidence of other similar frauds perpetrated by the same person *on or about the same time,* is admissible particularly where the acts are all part of one general scheme or plan to defraud." (Italics ours.)

And the rule is stated in 10 R. C. L., page 938, Section 105, as follows:

> "Similar fraudulent acts are admissible if committed *at or about the same time*, and when the same motive may reasonably be supposed to exist, with a view to establish the intent of the defendant in respect to the matters charged against him in the declaration. To show fraudulent intent with which representations were made, evidence of other fraudulent representations of a similar character, made by the same person, *and about the same time,* is admissible." (Italics ours.)

It must be remembered that no alleged similar acts, conduct or transactions by appellant were shown by the Government between the Troeger transactions in 1920-1923 and the Indictment in this case and hence the Troeger transactions were too remote under the rule stated, *supra.*

B.

The Troeger Evidence Considered as a Whole Showed No Fraud, Deceit or Misrepresentations.

The witness Troeger's father, John F. R. Troeger, was an inventor. Appellant entered into a contract with him [Plaintiff's Exhibit 101, Tr. pp. 900 and 901] for the promotion and development of certain inventions. Appellant agreed to pay Mr. Troeger the sum of $7,500.00 and gave his note therefor. Upon the maturity of this note, on or about July 7, 1920, appellant paid $1,500.00 thereon and gave a renewal note for $6,000.00 [Tr. p. 904], stating at the time he would not be able to pay the renewal when due. Thereafter, however, said note was paid in full. [Tr. p. 921.] The note transaction obviously did not involve any element of fraud, deceit or misrepresentation, otherwise, the same would not have been paid.

On January 23, 1923, the witness Troeger's father, John F. R. Troeger, entered into a settlement agreement between himself and H. Harry Meyers, American Lux Products Corporation, Trans-Lux Company and Percy N. Furber. [Tr. pp. 926-931.] This contract recited that because of certain disagreements between the parties

mentioned therein, a complete, full and final settlement was desirable and necessary and, pursuant thereto, John F. R. Troeger received in cash the sum of $2,857.00 and 1,500 shares of the common stock of the American Lux Products Corporation.

Notwithstanding said contract of settlement, the witness Troeger was permitted to testify that Meyers never paid the note to his father; that Meyers had promised his father a lifetime job and did not keep his promise, but instead terminated the contract of employment. The written contract of employment of John F. R. Troeger appears in the transcript as Plaintiff's Exhibit No. 108 [Tr. pp. 916 and 917] and provides that "This agreement is to commence on the first day of February, 1920, and to end on the 31st day of January, 1922," during which period Mr. Troeger was to receive a salary of $3,-600.00 per annum, payable in equal monthly installments. John F. R. Troeger was not discharged nor was his contract terminated. Mr. Troeger was notified on January 24, 1922, by the American Lux Products Corporation, with whom his contract of employment was made, that said contract "ending the 31st of this month, will not be renewed, due to the fact that we have to conserve in order to go on with our work and we find it necessary to take this action." [Tr. p. 919.]

It thus appears that each and all of the damaging statements made by the witness Troeger in his testimony, were shown to have no existence in fact and hence did not constitute similar acts, conduct and transactions from which intent to deceive or defraud could be implied.

III.

Appellant Was Convicted on Incompetent and Hearsay Evidence.

Appellant's conviction resulted principally from the erroneous admission of incompetent and hearsay evidence. If this incompetent and hearsay evidence had been excluded the remaining competent evidence would have been insufficint to warrant a verdict of guilty. That this is true is shown by the fact that appellant was not convicted at the first trial of the case when this evidence was not offered or admitted.

The Government's case against appellant rested mainly upon two charges: first, that he was falsely represented as being a man of wealth and influence; and, second, that he was falsely represented as having been associated with the Joseph B. Strauss interests in the promotion and construction of the Golden Gate Bridge. Excluding the incompetent and hearsay evidence on these two charges, the Government's case had little, if any, evidence to support the charges.

A.

Appellant's Association With Strauss.

The Government offered the letter from Strauss to Swenson [G. Ex. 98] and the printed volume describing the history of the construction of the Golden Gate Bridge [G. Ex. 95] as its chief evidence that appellant had no connection with Strauss in that enterprise. Appellant has already shown that the letter and printed volume were incompetent and hearsay. We are here primarily concerned with the prejudicial effect of these exhibits, and the arguments based upon and the inferences drawn from

them by the Government. Without this evidence the trial Judge said:

> ". . . as far as the triers of the facts were concerned, *that would have compelled them* to resolve the allegation in the Indictment that there was an intimate and close relationship between Strauss and the defendant, and that the defendant was one of the major characters in the construction of the Golden Gate Bridge." [Tr. p. 1452.] (Italics ours.)

This evaluation of the evidence was and is eminently correct. The Court, no doubt, had in mind the scores of letters which Strauss had written to appellant showing unmistakably that appellant was the trusted adviser and associate of Strauss in the promotion and building of the Bridge from 1929 to 1934; that appellant secured the appointment of Strauss as Engineer of the Bridge District; that he was active in shaping favorable public opinion for the Bridge; that he was Strauss' representative in selling the bonds issued to pay for the Bridge; and that Strauss had paid him more than $200,000.00 for the services thus rendered. In other words, the evidence of the association and connection between Strauss and appellant was so overwhelming that the trial court says it "would have compelled" the jury to find that Meyers "was one of the major characters in the construction of the . . . Bridge."

Conversely, the harmful effect of the letter of Strauss to Swenson and of the printed volume mentioned, both incompetent and hearsay, is apparent from the trial court's statement, *supra*. It is thus obvious that, but for these, the Government's charge of fraud, based upon alleged lack of association between Strauss and appellant, would have completely failed.

B.

Appellant's Influence and Financial Standing.

The Government charged that appellant had no standing or influence, or financial ability to drill the Frenchman Hills well. To bolster up these charges it offered the evidence of Ernest A. Troeger to show that about 14 years before the Indictment in this case appellant did not promptly pay a $7,500.00 note to his father, and evidence concerning appellant's income tax returns for years subsequent to the matters and transactions set forth in the Indictment. It is clear that such evidence was prejudicial in that it tended to rebut evidence that appellant had about $400,000.00 in cash, and other resources [Tr. pp. 886, 887], when he became interested in the Frenchman Hills project; and such evidence also tended to minimize the fact that appellant paid $196,000.00 on the costs of drilling the Frenchman Hills well. That this incompetent evidence was highly prejudicial cannot be doubted.

Even Government's own evidence shows that appellant had standing sufficiently high and good as to enable General Goethals, Engineer and Builder of the Panama Canal, to recommend him to Joseph B. Strauss. [Tr. p. 867.]

Conclusion.

The admission of the incompetent and hearsay evidence detailed in appellant's opening brief and in this brief, over objections and exceptions of appellant was prejudicial, deprived him of a fair trial and resulted in his conviction.

The incompetent and hearsay evidence so admitted related to vital issues in the case and was doubtless the determining factor in the verdict of the jury.

Wherefore, it is respectfully submitted that the judgment of the trial court should be reversed and appellant be granted a new trial.

Respectfully submitted,

John W. Preston,
Bertil E. Johnson,

By John W. Preston,

Attorneys for Appellant